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No. 419

In the Supreme Court of the United States

OCTOBER TERM, 1956

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION

MOTION TO AFFIRM

ROBERT W. GINNANE,
General Counsel,

H. NEIL GARSON,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

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Pursuant to Rule 16, par. 1 (c) of the Revised Rules of this Court, appellee, Interstate Commerce Commission, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered May 25, 1956, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order denied the application of appellant

A. W. Schaffer, d. b. a. Schaffer Transportation Company, (hereinafter called Schaffer) for a certificate of public convenience and necessity pursuant to Section 207 (a) of the Interstate Commerce Act, 49 U. S. C. 307 (a). The order was predicated upon the ultimate finding that "applicant has failed to establish that the present or future public convenience and necessity required the proposed operation. * * *" (J. S. 65).

After the completion of the administrative procedure, appellants sought relief from a three-judge statutory district court. On review, the court, in a comprehensive decision (J. S. 14–25), unanimously sustained the Commission's report and order. Thereafter on May 17, 1956, it issued its judgment dismissing the complaint (J. S. 26, 27).

ARGUMENT

The Commission, under the provisions of Section 207 (a) of the Interstate Commerce Act, 49 U. S. C. 307 (a) (J. S. 72), is authorized to grant certificates of public convenience and necessity to qualified applicants desiring to perform transportation in interstate commerce provided that the Commission finds, among other things, that proposed service is required by the present or future public convenience and necessity. Otherwise, the application shall be denied. In its report in *A. W. Schaffer Extension—Granite*, Docket No. MC–93529 (Sub No. 2), decided February 7, 1955, the Commission found that public convenience and necessity did not require the operation by appellant, Schaffer, as a common carrier by motor vehicle

of granite from points in Grant County, South Dakota, to points in ten states and the District of Columbia, and from Vermont to points in sixteen states (J. S. 49–65). The ultimate finding was based upon the conclusion that the existing service was adequate and that the shippers which supported the application were motivated by desire for lower rates rather than improved service (J. S. 65). Accordingly, the Commission found that appellant Schaffer had failed to fulfill the essential requirement of Section 207 (a) of the Interstate Commerce Act, namely, to establish that "the proposed service * * * is or will be required by the present or future public convenience * * *." The conclusion and ultimate finding were based upon uncontroverted adequate findings of fact fully set forth in the Commission's report (J. S. 49–65).

The sole issue raised on appeal by appellants is that the Commission in denying the application predicated its decision upon a finding that existing rail service was adequate, and that as a result no need was shown for the proposed service by Schaffer. Appellants contend that such a finding violates the "* * * underlying purpose of the Interstate Commerce Act and contravenes the National Transportation Policy * * *" (J. S. 5). The Commission did not deny the application upon such a finding. A careful reading of the Commission's report (J. S. 49–65) clearly shows that it based its conclusion upon findings of fact resulting from an analysis of the entire record which disclosed the adequacy of existing rail *and* motor carrier service (J. S. 64–65). The Commission further found in

essence that independent of the sufficiency of the existing transportation facilities, the applicant had failed to maintain the burden of proof showing a need for his service, because the shippers were interested only in lower rates rather than a need for improved service (J. S. 65). The Commission has consistently refused to consider the issue of rates as pertinent in proceedings for operating authority since that is a matter for which other sections of the Interstate Commerce Act provide a remedy. *Wellspeak Common Carrier Application*, 1 M. C. C. 712; *Youngblood Extension of Operations—Canton, N. C.*, 8 M. C. C. 193; *Johnson Common Carrier Application*, 18 M. C. C 194; *Omaha & C. B. Ry. & Bridge Co. Common Carrier App.*, 52 M. C. C. 207, 235; *Black Extension of Operations—Prefabricated Houses*, 48 M. C. C. 695, 709; *Pomprowitz Extension—Packing House Products*, 51 M. C. C. 343, 350. The report of the Commission also shows that several of the supporting shipper witnesses had failed to investigate the availability of existing motor carrier service (J. S. 56, 57, 58, 59).

Thus the principal issue left for judicial review as found by the district court was "* * * whether there is a reasonable and rational basis for the orders predicated upon the findings of the Commission and whether the Commission's actions in the premises complies [sic] with the Congressional mandate as set forth in Part 2 of the Interstate Commerce Act (49 U. S. C. 301–327) and the National Transportation Policy (49 U. S. C. preceding Sec. 1)."

The district court in unanimously upholding the Commission's action concluded (J. S. 23):

> We have carefully reviewed the evidence in this case, and without detailing it, we are unable to say that the Commission's conclusions and orders are not supported by substantial evidence, or that it acted illegally, arbitrarily or capriciously.

In addition, the court pointed out that while it might "* * * have reached a different conclusion if it had been weighing the evidence in this case * * *" nevertheless, it held "* * * the Commission acted within the scope of its authority, that the Commission acted without abuse of its discretion, that its action was not arbitrary or capricious, and that there were adequate facts to support its findings and that its conclusions are not contrary to law" (J. S. 25). See *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241.

We submit that the Jurisdictional Statement reveals a misconception of the issues of the case, and that the sole question upon review is whether or not the Commission properly determined the public convenience and necessity, a matter delegated by Congress to the administrative discretion of the Commission. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65. We further submit that the Jurisdictional Statement does not raise any special or unusual circum-

stance which warrants a reanvassing of the record by the Court. *New England Divisions Case*, 261 U. S. 184, 203, 204; *Radio Corp. v. U. S.*, 341 U. S. 412, 415.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

Robert W. Ginnane

ROBERT W. GINNANE,

General Counsel,

H. Neil Garson

H. NEIL GARSON,

Assistant General Counsel,

Interstate Commerce Commission.

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